Supreme Court, U.S.
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No. 94-672

In the

Supreme Court of the United States

October Term, 1994

Yvonne Brown,

Petitioner,

v.

University of Medicine and Dentistry of New Jersey,

Respondent.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Deborah T. Poritz
Attorney General of New Jersey
Attorney for State Respondent
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 984-8150

ANDREA M. SILKOWITZ
Assistant Attorney General
Counsel of Record

VICKI A. MANGIARACINA
ROBERT A. BLASS
Deputy Attorneys General
On the Brief

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit properly interpreted existing case law under 42 U.S.C. §2000e and the New Jersey Contractual Liability Act and related case law in affirming summary judgment by the United States District Court for the District of New Jersey dismissing the complaint.

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COUNTERSTATEMENT OF THE CASE

This case involves petitioner Yvonne Brown's claim that she was denied a faculty appointment at respondent University of Medicine and Dentistry of New Jersey - New Jersey Dental School. Petitioner filed a complaint in the United States District Court for the District of New Jersey on February 28, 1991, alleging race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., against defendant University of Medicine and Dentistry of New Jersey ("UMDNJ"), a corporate and political subdivision then under the New Jersey Department of Higher Education, under N.J.S.A. 18A:64G-1 et seq. App. at 19.[1]

At all times relevant to her complaint, petitioner, a black female, was employed at the UMDNJ-New Jersey Dental School as a dental hygienist. Brown's duties consisted primarily of rendering dental hygiene care and services to patients at the dental school. As with other dental school employees, she also assisted the faculty in their administration of the educational program to dental students. Although Brown has characterized herself as an instructor, her limited interaction with dental students in actuality involved relatively brief and informal technical or clerical guidance to students in matters of dental hygiene and nutrition in the manner of other non-faculty clinicians and staff members. App. at 215-16, 245-49. She was not a member of the faculty, directed no courses, administered no examinations, graded no tests and issued no grades. App. at 214-16. She has neither published nor presented scholarly papers and is not formally designated on any research project as an investigator, co-investigator or research

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[1]The term "App." refers to the parties joint appendix filed with the U.S. Court of Appeals for the Third Circuit.

assistant. App. at 96-100. The "research" she refers to in her brief, at 4, is the "personal research" she described at deposition, admitting that she "didn't tell anyone about it." App. at 97-98. In contrast to faculty members at the dental school who devote the bulk of their time to teaching and/or research, petitioner spent the vast majority of her time arranging for patient care or treating patients. App. at 215. At the direction of her supervisor, Brown also did outreach work with local schoolchildren. App. at 217.

At various times during her employment in the Department of Pediatric Dentistry, petitioner allegedly requested that she be made a faculty member at the dental school and on each occasion was refused.[2] The most recent request, to the chairman of her department, Dr. Milton Houpt, was denied on or about September 7, 1987. App. at 265. That denial gave rise to this action. Houpt explained to her at the time that her duties did not merit a faculty appointment. App. at 201. Brown thereafter filed an E.E.O.C. charge, on May 24, 1988, alleging race discrimination in that UMDNJ instead appointed an allegedly less qualified non-black dental hygienist to the faculty position sought by her. App. at 264.

The hygienist referred to by petitioner, Cynthia Fong, a Hispanic/Asian, App. at 67, was actually appointed six months earlier, on or about March 12, 1987, to a faculty position in another department, Oral Diagnosis and Radiology, and by another supervisor, department chairman

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[2]As accurately described by petitioner, App. at 77, and provided in the University By-laws, faculty appointments are proposed by the department chairman to the dean. The proposed appointment is then submitted by the dean for approval by the University's board of trustees.

Peter Kudyba.[3] Fong's appointment in Oral Diagnosis and Radiology was not the result of any job posting or competition, but by Fong's request to the chairman of that department. App. at 67. Brown never requested from the chairman of Fong's department a faculty appointment and never conveyed her interest in an appointment to Fong's chairman. She thus never competed for the position awarded to Ms. Fong in that department. App. at 77-78.

Fong, who graduated valedictorian with a master's degree in dental hygiene from Columbia University School of Dental and Oral Surgery, had been the principal investigator on a number of research projects at Columbia which resulted in published papers, a co-investigator on one project and an assistant in another study at UMDNJ, and had significant teaching and administrative responsibilities, all prior to receiving her faculty appointment in the Department of Oral Diagnosis and Radiology. App. at 67. Fong's professional leadership and academic accomplishments led eventually to her appointment by the governor to the New Jersey State Board of Dentistry. App. at 357.[4]

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[3]Under the By-laws, to be appointed to the position, for example, of clinical assistant professor, the appointment received by hygienist Cynthia Fong, a candidate must demonstrate continued growth and development in his field of specialization and/or clinical service, effective teaching, ability to work independently in research, and should be recommended by his colleagues and department chairman as possessing the capacity or potential for broad, general service in the University. App. at 37.

[4]By contrast, although not considered since she never applied for the position awarded to Fong, Brown's own work history reflects both scholastic and employment shortcomings. She encountered academic difficulties in obtaining her undergraduate degree at Fairleigh Dickinson University and, at one point, had been asked to leave for poor academic performance. App. at 104-07. Additionally, she was fired from her previous job at Beth Israel Hospital and Medical Center in Newark. App. at 107.

Fong's department chairman concluded that Fong's duties at the time merited a faculty appointment in the Department of Oral Diagnosis and Radiology. Then, as now, she had no responsibility for treating patients, unlike Brown who was hired primarily to service patients in the Department of Pediatric Dentistry. Brown's supervisor Houpt played no role in Fong's appointment. App. at 211. Moreover, as Brown herself admitted during oral argument below, there was in fact no faculty position available to her or anyone else in her department (Pediatrics) at the time. App. at 360. And, indeed, Houpt had never recommended the appointment of a non-doctor to his department faculty up until four years later. App. at 204.

Brown's position was eventually eliminated in June 1991, the result of a school-wide reorganization and she was notified that she was to be laid off. App. at 230-31. Pursuant to UMDNJ policy, however, Brown exercised her "bumping rights" and when a position became available returned to the dental school on November 17, 1991. App. at 134. Her duties once again were to perform hygiene services in a number of departments, including Pediatric Dentistry, under the reorganization, App. at 194 and 232, by now almost a year after the complaint in this matter had been filed.

Contrary, therefore, to Brown's bizarre and insupportable suggestion in her brief, at 26, that UMDNJ used her medical leave as an excuse to eliminate her position and to prevent her from obtaining a faculty appointment, Brown was, in fact, employed by and present at the school on or about November 25, 1991, when Houpt posted a notice in the dental school, of an available faculty position in Pediatric Dentistry, now more than four years after

Brown's last request. This faculty position was for a clinical instructor who would instruct doctoral students in preventive dentistry. The new position was also open to dental hygienists. App. at 383-384. Not only was the position posted in the school for all, including Brown, to see, but, for the benefit of the state-wide dental community, Houpt also published an advertisement for the position in the Autumn 1991 issue of the Journal of the New Jersey Dental Association. App. at 223-24 and 384.

Despite these notices, Brown did not respond or submit an application for this position and so was never considered. Ms. Schoen, a dental hygienist and then a faculty member at the University of Maryland, did apply and ultimately was selected for the position in or around January 1992. App. at 212, 223-24. Schoen's faculty appointment in Pediatric Dentistry, like that awarded almost five years earlier to Fong in Oral Diagnosis, involved formal instruction and not clinical care. Contrary to Brown's assertion, without support, in her brief, at 10, neither Schoen nor Fong assumed Brown's old position, since, again, faculty appointments are awarded for teaching and research purposes, and not for clinical service.

Although Brown claims she was denied an opportunity to apply for the new position awarded to Schoen, the record proves otherwise. Brown was invited by the posting and published advertisement to apply. Indeed, she was even employed at UMDNJ at the time and could easily have applied for the advertised newly created vacancy, App. at 235, but she failed to do so. Brown was ultimately laid off in 1992 as a result of a University-wide reduction in force (RIF).

For all times relevant to the complaint, Brown was represented by Teamsters Local 97 of New Jersey. The terms and conditions of employment, including the remediation process for all grievances relating thereto, are governed exclusively by Article IV, Section B.1 of her union agreement. App. at 239. Brown states she requested that her union file a grievance regarding the denial in 1987 of her demand for a faculty appointment, but was advised by the union representative that the union could not handle this type of grievance, to wit, her demand to be appointed to the faculty. App. at 103. In fact, "promotion" or "upgrade" from staff to faculty is not provided for or contemplated by any framework or mechanism in the union contract or any UMDNJ rule, regulation or policy incorporated therein by reference. Moreover, there is no written or oral agreement or any understanding that Brown would be eligible for or entitled to a faculty appointment, nor has any been identified by Brown. Indeed, she has admitted that her requests were consistently denied. In short, her expectation that she would receive a faculty appointment is not based on any agreement, action or representation by UMDNJ, express or implied, regardless of the quality of her job performance.

Finally, although in the record below Brown alludes to alleged violations of other employment benefits, including UMDNJ's attendance or vacation policy, supervision practices, job posting and bidding, and reimbursement for continuing education, App. at 138-143 and 173-176, as relating somehow to her discrimination claim, there is no record of any formal grievances filed by the union on her behalf with respect to such allegations. Brown has also attributed to UMDNJ employees, other than her supervisor, certain personal comments, alleged to have been made by an unidentified person back in 1978 or 1979, describing her as a "troublemaker." App. at 148. None of

such comments was attributed to her supervisor, and none has ever been substantiated.

The EEOC investigated Brown's complaint and, on June 23, 1989, dismissed the charge, concluding that "there is no evidence of record to indicate that Charging Party has been or is being treated differently because of her race." App. at 267. Following the EEOC's review of its decision, at Brown's request, a 90-day Right-to-Sue letter was issued by the EEOC on December 24, 1990. App. at 12. The complaint was filed on February 28, 1991. App. at 7-19.

After full discovery, UMDNJ moved for dismissal under Fed. R. Civ. P. 12(b) and for summary judgment under Fed. R. Civ. P. 56(b). App. at 28. Briefs were filed, App. at 30, 280, 322 and 330, and oral argument, App. at 347, was held in the United States District Court by a United States magistrate judge hearing the case by consent of the parties, pursuant to 28 U.S.C. §636(c). App. at 26.

On October 18, 1993 the court issued its opinion and order granting summary judgment in favor of UMDNJ and dismissing the complaint. Petitioner's Appendix B. The court concluded from the evidence and arguments that, inter alia, Brown had failed to state a prima facie case for discrimination. The court concluded that the persons with whom Brown compared herself were given faculty positions different than the one requested by Brown and that "plaintiff never applied for the positions that Ms. Fong and Ms. Schoen received." Petitioner's Appendix B, at 15a. Additionally, the court determined that plaintiff's claims of breach of an implied covenant of good faith and fair dealing were precluded by the provisions of the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq.

Petitioner's Appendix B, at 12a. Finally, Magistrate Pisano concluded that "no genuine issue of material fact exist[ed] for trial." Petitioner's Appendix B, at 7a.

On July 6, 1994, the United States Court of Appeals for the Third Circuit issued a Judgment Order which summarily affirmed, without opinion, the decision of the district court. Petitioner's Appendix A, at 1a-2a.

ARGUMENT

I. THE THIRD CIRCUIT COURT OF APPEALS' AFFIRMANCE OF SUMMARY JUDGMENT WAS IN KEEPING WITH ITS OWN AS WELL AS THIS COURT'S INTERPRETATION OF TITLE VII

A. Petitioner Was Unable to Meet Her Prima Facie Burden

Petitioner claims that UMDNJ discriminated against her by denying her a faculty position in favor of two less qualified non-black hygienists, one of whom petitioner originally erroneously claimed as being white. As found by the courts below, petitioner failed, however, to make a prima facie case for disparate treatment under Title VII because of the undisputed facts that she never applied for either of the positions eventually awarded to the other hygienists. Petitioner's Appendix at 15a.

In a Title VII claim, a plaintiff is required first to establish a prima facie case by showing that she was a

member of a protected class, that she applied for an available position for which the employer was seeking applicants, that she was qualified for the position in question, but was nonetheless rejected, and that equally situated non-members of the protected class were treated more favorably with respect to such position, or that the position remained vacant and the employer continued to seek applications from individuals equally or less qualified than the complainant. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Ezold v. Wolf, Block, Schorr & Solis Cohen, 983 F.2d 509, 522 (3rd Cir. 1992).

Reading petitioner's brief, in particular, her latest recollection of facts in her succession of appeals, it is often difficult to believe that this is the same plaintiff who is the subject of the record below. Her brief is filled with distortions and unreferenced facts and crippling inconsistencies. The district court, however, recognized simply that Brown had failed to demonstrate any factual dispute as to the prima facie elements of her claim and, indeed, failed even to establish that such elements even existed in her case as a matter of law. Petitioner's Appendix at 7a, 14a-15a.

Brown was required to show that she was equally or more qualified for an available position than other similarly situated employees selected. Although, as a matter of record, Brown was not as qualified as those selected, in fact, there was no available position in her department in 1987, as she herself admitted during argument, and no applications were sought or solicited. App. at 360. Moreover, Brown never actually sought either Fong's or Schoen's position. It is also undisputed that Brown and Fong were assigned to different departments

with different responsibilities and reported to different supervisors. Fong's request to her supervisor occurred almost a year before Brown's request to her own supervisor. Brown's supervisor Houpt had no involvement in Fong's appointment in another department and neither Fong nor Brown sought or received an appointment from the other's supervisor. The record also demonstrates that Fong and Brown each served her respective department in manifestly different ways, Fong primarily as an instructor and administrator in Oral Diagnosis, and Brown as a staff clinician in Pediatrics. Brown fancies herself clinically superior to Fong and Schoen as the basis for her "qualifications," but in fact both faculty positions involved teaching experience, not clinical skills.

"It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly situated in all respects." Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992) (emphasis in original). "[T]o be deemed 'similarly situated,' the individual with whom plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct with such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Id.; see also E.E.O.C. v. Metal Service Co., 892 F.2d 341, 347 (3rd Cir. 1990) ("A disparate treatment violation is made out when an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion under title VII."). Failure of proof as to even one element of a prima facie case leaves a complaint fatally defective and susceptible to summary judgment. Garrett v. Lujan, 799 F.

Supp. 198, 201 (D.D.C. 1992), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Brown's belief that faculty positions are created and funded on an ad hoc basis to suit the whims and aspirations of anyone who applies is not supported by the record below. The same is true for her claim that UMDNJ had a "pattern and practice" of "upgrading." App. at 371. Brown conceded that Fong obtained her appointment in a different department from a different supervisor. App. at 361. Moreover, the court observed at argument that "[i]n fact, there wasn't a position given to anybody after Ms. Brown's request was denied." App. at 361. Petitioner at first tried to dispute this by claiming that another person, Lynne Connolly, a white female, was given the position, but in her deposition, Brown herself conceded that Connolly's appointment was as clinic administrator, a non-faculty position, and that Connolly's appointment occurred in 1979, more than eight years prior to Brown's 1987 request. App. at 129. It is also undisputed that Brown's supervisor Houpt had never recommended a non-doctor for a faculty position and did not do so until more than four years later. App. at 204.

Brown's reliance on E.E.O.C. v. Metal Service Co., supra, is misplaced and overwrought. Unlike the plaintiffs in Metal Service, Brown never conveyed her interest in a faculty appointment to Fong's chairman Peter Kudyba. Moreover, again, in contrast to the plaintiffs in Metal Service, it wasn't until after more than four years had passed and the instant complaint had already been filed, that funding for a new faculty position, open for the first time to hygienists, became available in Brown's department. Yet Brown ignored the job posting in the school and the advertisements in the statewide dental journal and utterly

failed to apply for or make known her interest in the position, giving the lie to her insistence that she "did everything conceivable and reasonable to convey her interest in job advancement." Petitioner's Brief at 15. Moreover, Brown's claim that Fong and Schoen assumed Brown's duties in the dental clinic is untrue and not supported by the record below. There is no credible evidence in the record that Brown's former position was "re-opened as a faculty position." Petitioner's Brief at 16.

With respect exclusively to the prima facie elements of her burden under Title VII, the essential facts remain undisputed. Brown never requested, never applied, and was therefore never considered for either of the faculty positions awarded to others, in the first instance involving a hygienist (Fong) not at all similarly situated to Brown, and, in the second, involving a position for which Brown, through no fault other than her own, failed to apply. Having failed to set forth the requisite factual basis for a Title VII action, Brown's discrimination claim was properly dismissed, and the court's decision properly affirmed. For these reasons alone, the petition should be denied.

These same facts also encompass UMDNJ's response to Brown's assertion in the petition that the University failed to articulate a legitimate reason for rejecting Brown's request. Although petitioner's argument relates to pretext and not her prima facie burden, the record, including her own admissions, make clear that no faculty position was available in her department at the time of her request. It is also undisputed that Brown's interest in a position was unknown to Fong's supervisor and therefore immaterial to his recommendation of Fong's appointment in 1987. And, of course, Brown did not apply more than four years later, when applications were sought by Brown's

supervisor Houpt for the position eventually awarded to Schoen. In neither case is there any evidence in the record of racial or other animus by UMDNJ or, in particular, Brown's supervisor.

Once a prima facie showing by the plaintiff is made, the defendant is obligated to articulate a legitimate, non-discriminatory reason for the action under review. McDonnell Douglas v. Green, supra, 411 U.S. at 802 (1973). The burden then returns to the plaintiff, in the context of a motion for summary judgment, to raise a factual dispute as to whether the reasons proffered by defendant are a mere pretext for discrimination. Hights v. Internat'l Harvester Co., 675 F. Supp. 418, 421 (N.D.Ill. 1987). In order to prove pretext, however, "the evidence as a whole must show more than a denial of promotion in the context of disagreement over the merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department." Molthan v. Temple U., 778 F.2d 955, 962 (3rd Cir. 1985); Bennun v. Rutgers U., 941 F.2d 154, 170 (3rd Cir. 1991), cert. denied, 502 U.S. ___ (1992).

As to Brown's apparent belief that faculty appointments are there for the asking and that UMDNJ did not provide a legitimate, non-discriminatory reason for denying Brown a faculty appointment, again, the record shows that Houpt explained to Brown back in 1987 that her staff position did not merit a faculty appointment. Whether Brown understood the explanation, was satisfied with it, or even considered it an explanation does not raise an inference of discrimination. An employer's practices need not be rational, wise or well-considered, only nondiscriminatory. Gibbs v. Consolidated Edison Co. of N.Y., Inc., 714 F. Supp. 85, 92 (S.D.N.Y. 1989)(quoting Powell v. Syracuse

U., 580 F.2d 1150, 1157 (2nd Cir. 1978), cert. denied, 439 U.S. 984 (1978)). Evidently, Brown simply chooses to color every statement, no matter how innocuous, as discriminatory.

Petitioner, cites Bennun v. Rutgers U., supra, ostensibly for the proposition that her clinical proficiency should be equated with research and teaching experience in the selection of a faculty member. Clinical skill was neither an element in the appointments of Fong and Schoen nor is it a factor in the criteria described above in UMDNJ by-laws for faculty appointments. Most important, these standards, and Brown's confusion regarding them, were irrelevant to the district court's consideration since Brown never applied for Fong's job and she never applied for Schoen's job.

B. The Court of Appeals and the District Court Correctly Applied the Standards for Granting Summary Judgment[5]

The record below contains no credible evidence that could or would support an inference that Brown was discriminated against. The clarity of the record below, unembellished by petitioner's present distortions, demonstrated to the satisfaction of the courts below that summary judgment was appropriate.

In the context of a motion for summary judgment, a court must determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Specifically, the court must inquire

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[5] This subsection addresses the issues raised in Point III of petitioner's brief.

whether the evidence "is so one-sided that one party must prevail as a matter of law." Id. at 2512; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "A plaintiff's general and conclusory allegations alone, are insufficient to establish" that such an issue exists. Miller v. Yellow Freight Systems, Inc., 748 F. Supp. 1074, 1078 (W.D. Pa. 1991), aff'd, 941 F.2d 1202 (3rd Cir. 1991); Liberty Lobby, supra, 477 U.S. at 248.

To withstand a summary judgment motion, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," but "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); see also Healy v. N.Y. Life Ins. Co., 860 F. 2d 1209, 1220 (3rd Cir. 1988), cert. denied 490 U.S. 1098 (1989). In the absence of such evidence in a summary judgment proceeding, the court may rely on its own view of the persuasiveness of the evidence and the plausibility of competing inferences. Matsushita, supra, 475 U.S. at 587-88.

Petitioner's so-called "genuine issues" in her Point III relate to the pretext component of a Title VII analysis -- Brown seems intent on ignoring her prima facie burden -- but reference to the record below exposes her factual assertions to be partly fiction, found by the district court to be based on little more than subjective and conclusory opinions or rank speculation, unsupported by any objective evidence or independent corroboration. In some instances, Brown contrives factual disputes by distorting the record on appeal, often contradicting her own prior sworn statements. See Hackman v. Valley Fair, 932 F.2d 239 (3rd Cir. 1991) (district court may disregard nonmovant's

affidavit contradicting earlier testimony in determining existence of a genuine issue of material fact); Maietta v. U.P.S., Inc., 749 F. Supp. 1344, 1359 (D.N.J. 1990), aff'd, 932 F.2d 960 (3rd Cir. 1990).

Brown's claim that Fong and Schoen have less job experience and are currently performing her old duties is not supported by the record which shows that Brown's clinical experience was not, and is not, the basis for a faculty appointment and that neither Fong nor Schoen has any direct clinical responsibilities as Brown did. Brown's exaggerated perception of her "teaching" duties is not supported by the record. The record also shows that Houpt played no role in Fong's appointment in another department. Indeed, up until 1991, he had never recommended a non-doctor for appointment to the faculty in his department. App. at 204. While Brown may not like them, these undisputed facts demonstrate the inevitability of the summary judgment granted below.

Brown also refers to a comment allegedly made by an unidentified graduate student in turn allegedly quoting another faculty member (not her supervisor Houpt) approximately more than ten years before she filed her initial complaint about her being labeled a "troublemaker." App. at 148; Petitioner's Brief at 7. This comment is inadmissible rank double hearsay, unproved and unprovable, and otherwise surely time-barred. Frieze v. Boatmen's Bank of Belton, 950 F.2d 538, 542 (8th Cir. 1991) (stray remark made four years before termination too remote to create reasonable inference of discrimination).

Brown asserts that the district court "mistakenly believed that Brown could have applied for the faculty position which was awarded to Fong." Petitioner's Brief at

27. This "belief" appears nowhere in the district court's opinion. Nor does the record below support Brown's insinuation in her deposition and her brief that Fong's appointment was obtained by stealth or that University administrators conspired somehow to ensure Brown's ignorance of any available position. In addition, as noted above, Brown's contention that she was thwarted somehow from applying for the position eventually awarded to Schoen because she was "prevented from exercising her bumping rights" is an outright distortion of the record. Brown's bumping rights were in fact honored, she was re-employed and was present when the position was advertised. Brown failed, however, to apply.

As described above, Brown was originally hired by UMDNJ despite her scholastic and employment history deficiencies. Despite mixed reviews of her performance as a dental hygienist, App. at 229, she did well enough to merit annual salary increments and whatever other benefits redound by contract to employees who perform at or above levels of expectation. None of such benefits provides for faculty appointment. Brown has been rewarded to the extent her contractual relationship with UMDNJ will allow and now intractably refuses to draw any constructive conclusions about her career except to claim that she is a victim of discrimination.

The record shows that Brown worked in a different department, for a different supervisor, and performed different functions than Fong; that Brown never apprised Fong's supervisor of her interest in a faculty position; that, with respect to the position awarded to Schoen, Brown failed even to apply. Those are not only the University's facts, they are Brown's facts. No promises of faculty appointment were made and no contractual

provisions, express or implied, exist for promoting or even contemplating promotion of a staff member into a faculty position, as Brown's own union recognized. Those too are not only UMDNJ's facts, they are Brown's facts. In considering the unembellished record before them, it is evident that summary judgment and summary affirmance were well within the established guidelines of the Third Circuit and this Court. The petition, therefore, should be denied.

II. THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S FINDING THAT PETITIONER'S CONTRACT CLAIM AGAINST RESPONDENT IS BARRED UNDER THE NEW JERSEY CONTRACTUAL LIABILITY ACT BARRING CLAIMS IN IMPLIED CONTRACT AGAINST PUBLIC ENTITIES AND THUS NO NEED FOR THIS COURT'S REVIEW OF STATE LAW IS WARRANTED

Contract actions against UMDNJ, a corporate and political subdivision of the State of New Jersey, are expressly governed by the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq., as provided in N.J.S.A. 18A:64G-3.1. The Act provides, in part, that "there shall be no recovery against the State ... for claims based upon implied warranties or upon contracts implied in law." N.J.S.A. 59:13-3. Accordingly, Brown's claim for breach of an implied covenant of good faith and fair dealing, more specifically, her contention that there is some kind of implied obligation on the part of UMDNJ to appoint her to the faculty, is barred by the Act.

The Contractual Liability Act is applicable to the State and any agency or office of the State, but does not

ordinarily apply to any state entity "which is statutorily authorized to sue and be sued." N.J.S.A. 59:13-2. Prior to amendment of UMDNJ's enabling legislation in 1992, described below, UMDNJ's sue-and-be-sued status was admittedly less explicit as the statute in effect at the time the cause of action allegedly arose did not specifically confer sue-and-be-sued status on UMDNJ. Petitioner argues that the former statute should be read to imply such authority. Nonetheless, as interpreted by the district court below and by the New Jersey state courts, UMDNJ is a public agency that, at the time the cause of action arose, did not have the statutory authority to sue and be sued and is therefore covered under the Contractual Liability Act. See also Briscoe v. Rutgers U., 130 N.J. Super. 493, 327 A.2d 687 (Law Div. 1974) ("the new corporate [UMDNJ] had no power to sue and be sued." Id. at 507, 327 A.2d at 695); and Rich v. State, 171 N.J. Super. 91, 407 A.2d 1281 (Law Div. 1979) ("the act which created [UMDNJ] designated the college as a state agency in the Department of Higher Education ... but without the power to sue and be sued." Id. at 93, 407 A.2d at 1282).[6]

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[6]The state Supreme Court of New Jersey in Fuchilla v. Layman, 109 N.J. 319, 537 A.2d 652 (1988), suggested otherwise, but petitioner has plainly misread the court's opinion. In fact, the court, while determining that UMDNJ was a "person" subject to 42 U.S.C.A. §1983, nonetheless declined to decide whether UMDNJ has "sue and be sued" status in the absence of an analysis of the legislative history, terming its status "problematic" and "inconclusive." Id. at 329, 537 A.2d at 658. Rich v. State and Briscoe v. Rutgers thus remain good law.

The court in Cohen v. UMDNJ, 240 N.J. Super. 188, 572 A.2d 1191 (Ch. Div. 1989), rev'd and remanded on other grounds, ___ N.J. ___, ___ A.2d ___ (1993), in dicta, cited to N.J.S.A. 18A:64G-6,7 of the former statute for the proposition that the University had the power to sue and be sued. Id. at 194, 572 A.2d at 1194. The district court below, however, agreed with respondent that a close reading of the provisions cited in Cohen reveals that neither N.J.S.A. 18A:64G-6 nor 64G-7 of that statute explicitly granted the University the power to sue and be sued.

A review of the legislative history behind enactment of the UMDNJ Flexibility Act of 1992 strongly supports this interpretation. The Flexibility Act amending UMDNJ's enabling legislation expressly restored sue-and-be-sued status, N.J.S.A. 18A:64G-6(t), while specifically maintaining governance of the Contractual Liability Act over contract claims against the University. N.J.S.A. 18A:64G-3.10.

The Flexibility Act was enacted, in part, in response to recommendations made by the Governor's Task Force on the Laws Governing the University of Medicine and Dentistry of New Jersey. This task force was created by Executive Order No. 177 in 1987 to study and consider various restraints on UMDNJ's ability to fully enter into and participate in partnerships with the private sector that would enhance its competitive status. Among these restraints, the task force noted that "UMDNJ's enabling legislation does not provide that it can 'sue and be sued'." Report of the Governor's Task Force on the Laws Governing the University of Medicine and Dentistry of New Jersey, March 30, 1989, at page 19. App. at 277-78. Consequently, the Legislature expressly conferred such authority to UMDNJ in the Flexibility Act. Statements appended to the Act when it was introduced in the Legislature confirm this. In both the Assembly Education Committee Statement to Assembly, No. 1094 (March 19, 1992), Attachment 3, and in the Assembly Health and Human Services Committee Statement to Assembly, No. 1094 (1st Reprint), May 4, 1992, App. at 279, the Legislature stated that the proposed legislation now "permits the university to sue and be sued in its own name." It is well settled that when the Legislature intends to confer sue-and-be-sued status on public entities, it does so specifically. See, e.g., N.J.S.A. 27:23-5(d) (New Jersey Turnpike Authority); N.J.S.A. 27:25-5(a) (New Jersey

Transit); and the new provisions relating to the University, N.J.S.A. 18A:64G-6(t). It is clear then that UMDNJ is and has been protected by the provisions of the Contractual Liability Act, as the district court concluded, and thus Brown's contract claim thereunder was properly barred.

Alternatively, petitioner's breach of covenant claims are in any event barred under the exclusivity provisions of her union's collective bargaining agreement. Article IV, Section B.1 (Grievance Procedure) of the union contract provides as follows:

> The purpose of this procedure is to assure prompt and equitable solutions of problems arising from the administration of this Agreement or other conditions of employment by providing an exclusive vehicle for the settlement of employee grievances. [App. at 243.]

A plaintiff may thus seek redress of any grievance derived from breach of contract, including any policies governing the terms or conditions of employment, through the Grievance Procedures established in the union agreement. See N.J.S.A. 34:13A-5.3 (The New Jersey Employer-Employee Relations Act) ("Grievance ... procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.") (emphasis supplied); Sanginario v. Attorney General, 87 N.J. 480, 491, 435 A.2d 1134 (1981).

Brown's "contract" claims of course are emphatically denied. But, in any event, there appears no evidence in the record of any formal grievances concerning

any of Brown's putative claims regarding the terms and conditions of her employment, including the school's attendance or vacation policy, job posting and bidding, supervision, and reimbursement for continuing education. And, as noted above, Brown's union declined to pursue a grievance on her behalf relating to the denial of her request for a faculty appointment.

Thus, even if the Contractual Liability Act is held inapplicable, Brown's breach of covenant claims are barred by the exclusivity provisions of her union agreement.

CONCLUSION

For the reasons stated in Magistrate Judge Pisano's opinion and for the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Deborah T. Poritz
Attorney General of New Jersey
Attorney for Respondent

Andrea M. Silkowitz
Assistant Attorney General
Counsel of Record

R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 984-8150

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